EXHIBIT A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CIN-Q AUTOMOBILES, INC. and MEDICAL & CHIROPRACTIC CLINIC, INC., individually and as representatives of a class of similarly-situated persons,	)	
Plaintiffs,	)	Civil Action No.: 8:13-CV-01592-AEP
v.	)	**DISPOSITIVE MOTION**
BUCCANEERS LIMITED PARTNERSHIP and JOHN DOES 1-10,	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Pursuant to Fed. R. Civ. P. 23, Plaintiffs, Cin-Q Automobiles, Inc. and Medical & Chiropractic Clinic, Inc., move the Court to certify the following three classes:

Class A:

All persons or entities who were successfully sent facsimiles offering tickets to Tampa Bay Buccaneers games from July 14, 2009, through July 16, 2009, which contained the following statement at the bottom of the fax: "To immediately and permanently remove your fax number from our opt-in compiled database, please call 877-272-7614. Removaltech@FaxQom.com."

Class B:

All persons or entities who were successfully sent facsimiles offering tickets to Tampa Bay Buccaneers games from August 17, 2009, through August 20, 2009, which contained the following statement at the bottom of the fax: "To immediately and permanently remove your fax number from our opt-in compiled database, please call 888-703-9205. Removaltech@FaxQom.com."

Class C:

All persons or entities who were successfully sent facsimiles offering tickets to Tampa Bay Buccaneers games from May 24, 2010, through June 9, 2010, which contained the following statement at the bottom of the fax: "If your office has decide to opt-out of further faxes please call 866-247-0920. Thank you."

As argued in Plaintiffs' memorandum of law, these classes easily satisfy the requirements of Rule 23(a) and (b)(3). Pursuant to L.R. 4.04(b), Plaintiffs state "the number of persons" in the

classes, according to the evidence gathered in discovery and reviewed by Plaintiff's expert, Robert Biggerstaff, is approximately 131,011, to whom BLP successfully sent 343,122 faxes offering tickets to Tampa Bay Buccaneers football games from July 2009 through June 2010.

MEMORANDUM OF LAW

"Class certification is normal" in TCPA cases "because the main questions, such as whether a given fax is an advertisement, are common to all recipients." *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 683 (7th Cir. 2013). This is "an archetypical example of a case in which the class action mechanism is superior to that of individual litigation of each claim." *Hazel's Cup & Saucer, LLC v. Around the Globe Travel, Inc.*, 86 Mass. App. Ct. 164, 166 (2014). Courts in this circuit regularly certify TCPA fax classes. *See Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 311 F.R.D. 688 (S.D. Fla. Aug. 5, 2015), on remand from 771 F.3d 1274 (11th Cir. 2014); *Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC*, 2014 WL 7366255 (S.D. Fla. Dec. 24, 2014); *C-Mart, Inc. v. Metro. Life Ins. Co.*, 299 F.R.D. 679 (S.D. Fla. 2014); *A Aventura Chiropractic Ctr., Inc. v. Med Waste Mgmt. LLC*, 2013 WL 3463489 (S.D. Fla. July 3, 2013).

The issue this Court identified for trial in denying summary judgment is whether the faxes were sent "on behalf of" BLP. That is a classwide question; the answer will not vary from one class member to another. The only other liability issues are whether the faxes are "advertisements" and whether the opt-out notice on the faxes violates FCC regulations, thus precluding a defense of "established business relationship" or "prior express invitation or permission." The answers to these questions will be the same for every class member. The Court should certify the classes and proceed to trial so a jury can decide BLP's liability as to all class members in one fell swoop. If BLP prevails, the judgment will bind every class member. If the

classes prevail, the Court should decide whether the violations were "willful or knowing" and, if so, whether to increase statutory damages from the $500 per-violation minimum.

Facts Supporting Class Certification[1]

A. BLP decides to advertise by fax and hires FaxQom.

In early 2009, Matt Kaiser, BLP's Director of New Business Development, pitched an idea to his superiors to "generate some ticket sales" by sending advertisements to fax numbers in and around Tampa, Florida. (Kaiser Dep. at 68). Kaiser had access to the team's "existing contacts," but wanted to drum up "new business" by targeting new customers. (*Id.*) Kaiser was authorized by BLP to hire a fax broadcaster to execute the advertising campaign. (BLP Resp. First Req. Admissions, No. 117). Kaiser conducted internet research on fax broadcasters and settled on a company called FaxQom. (Kaiser Dep. at 66).

On July 9, 2009, BLP and FaxQom executed a "Fax Indemnity Agreement," with an "addendum" drafted by Kaiser to give BLP greater "comfort." (*Id.* at 108). The addendum provides (1) FaxQom will "stop the campaign and refund all monies" at BLP's request, (2) FaxQom indemnifies BLP "from any and all complaints or litigation that may arise as a result of this campaign," (3) FaxQom will charge only for "successfully delivered faxes," (4) FaxQom will "send all faxes at the times and dates" specified by BLP, (5) "all faxes have been collected according to the best industry practices," and (6) "FaxQom will agree to and abide by all laws

[1] Attached in Plaintiffs' Appendix of Exhibits are the following: Ex. 1, Deposition of Matthew Kaiser ("Kaiser Dep."); Ex. 2, BLP Resp. First. Req. Admissions; Ex. 3, Compilation of BLP Documents Produced in Discovery; Ex. 4, Expert Report of Robert Biggerstaff ("Biggerstaff Report"); Ex. 5, Declaration of Robert Biggerstaff ("Biggerstaff Decl."); Ex. 6, Supplemental Report of Robert Biggerstaff ("Biggerstaff Supp. Report"); Ex. 7, Declaration of Ian Jenkins ("Jenkins Decl."); Ex. 8, Deposition of Ian Jenkins ("Jenkins Dep."); Ex. 9, Deposition of Craig Cinque ("Cinque Dep."); Ex. 10, Deposition of Michelle Zakrzewski ("Zakrzewski Dep."); Ex. 11, Firm Resume of Anderson + Wanca ("A+W Firm Resume"); Ex. 12, Brief Biography of Michael C. Addison ("Addison Biography"); Ex. 13, Proposed Class Notice.

associated with facimile [sic] marketing." (BLP000069). BLP General Counsel, Manuel Alvare, reviewed and approved the agreement. (BLP00136).

B. BLP orders fax broadcasts on July 14, 15, and 16, 2009.

On July 9, 2009, Kaiser directed FaxQom to send advertisements for Buccaneers tickets to over 100,000 fax numbers in the Tampa area on the following schedule: area code 727 – July 14, 2009; area code 813 – July 15, 2009; area codes 352 and 941 – July 16, 2009. (BLP000067). BLP paid FaxQom $15,336.80 for these first three broadcasts. (BLP000038).

On July 13, 2009, BLP sent FaxQom the final version of its first fax advertisement. (BLP000040–42). The fax was two pages, with the first page stating, "save up to $16 per ticket" by purchasing "group tickets" and a second page with a stadium diagram and ticket prices. (*Id.*) The second page states: "To immediately and permanently remove your fax number from our opt-in compiled database, please call 877-272-7614. Removaltech@FaxQom.com." (*Id.*; BLP000029). Kaiser told FaxQom that this fax was "for tomorrow only" and he would "send you the ones for Wednesday and Thursday after this one goes out." (*Id.*) Kaiser later sent FaxQom "the Wednesday and Thursday faxes (marked as 7/15 and 7/16)." (BLP000044).

On July 15, 2009, Plaintiff Medical & Chiropractic received an advertisement for Buccaneers tickets on its fax machine in area code 813, according to the schedule BLP dictated. (M. Zakrzewski Dep. at 9–10, 121; SAC., Ex. A). The fax is identical to the "7/15" fax Kaiser sent FaxQom the previous day. (BLP000045–46).

For the July 2009 faxes, FaxQom used another company called USADatalink, which provided the lists of fax numbers and in turn used a fax broadcaster called 127 High Street to physically transmit the faxes. Plaintiff subpoenaed USADatalink, and it produced a computer hard drive, which was reviewed by Plaintiff's expert, Robert Biggerstaff. (Biggerstaff Report ¶ 19). This district has found that Biggerstaff is "amply qualified" and his "relevant experience,

education, and training" makes him "competent to offer expert testimony in TCPA cases." *Shamblin v. Obama for Am.*, 2015 WL 1909765, at *3 (M.D. Fla. Apr. 27, 2015); *see also Hunt v. 21st Mtg. Corp.*, 2014 WL 1664288, at *3–4 (N.D. Ala. Apr. 25, 2014) (rejecting *Daubert* challenge to Biggerstaff in TCPA action). BLP did not depose Biggerstaff during expert discovery, which closed December 14, 2015. (Amended Case Mgmt. Order, Doc. 190).[2]

In analyzing the hard drive, Biggerstaff found a "Tampa Bay Bucs" directory with three subdirectories: "July 14-09," "July 15-09," and "July 16-09." (Biggerstaff Report ¶ 21). Biggerstaff states each subdirectory contained two files: "a list file containing fax numbers and a document which contained a 2-page flyer for Tampa Bay Buccaneers tickets, with a stadium diagram on the second page." (*Id.*) Biggerstaff also found on the hard drive emails from 127 High Street to USADatalink relating to three BLP fax broadcasts, on July 14, 15, and 16, 2009, consisting of (1) emails confirming the fax job submissions and identifying the filename of the list of target fax numbers and the document to be transmitted and (2) "exception" reports, which "identify individual failed fax transmissions for the corresponding broadcast." (*Id.* ¶ 19).

Biggerstaff compared the 127 High Street exception reports showing failed transmissions with the target lists and concluded these records "document 102,526 successful error-free transmissions, received by 102,524 unique fax numbers." (*Id.* ¶ 22). Biggerstaff also found Medical & Chiropractic's fax number in the list of fax numbers associated with the "7-15_buc_doc.pdf" file, and stated he "found no exception report" indicating the transmission was unsuccessful, meaning "that a fax was sent to this number and was a successfully received error-free transmission of the document '7-15_buc_doc.pdf.'" (*Id.* ¶ 27).

[2] Plaintiffs deposed BLP's expert witness at the time, David Canfield, on December 10, 2015, but BLP has since sought to replace Canfield, which Plaintiffs will likely object to at this late date.

C. BLP orders broadcasts on August 17–20, 2009, and May 24–June 9, 2010.

On August 13, 2009, BLP directed FaxQom to send a one-page advertisement for "individual game tickets" on the following schedule: area code 727 – August 17, 2009; area code 813 – August 18, 2009; area code 352 – August 19, 2009; area code 941 – August 20, 2009. (BLP000087). BLP paid $7,668.40 for this round of broadcasts. (*Id.*)

On August 19, 2009, Plaintiff Cin-Q received the "individual game tickets" fax at its area code 352 fax number, according to schedule. (Cinque Dep. at 268; SAC, Ex. B). The opt-out notice states, "To immediately and permanently remove your fax number from our opt-in compiled database, please call 888-703-9205. Removaltech@FaxQom.com," which is the same as the July faxes except with a different phone number. (*Id.*)

On May 18, 2010, BLP directed FaxQom to send a two-page fax advertising "group tickets" to fax numbers in area code 813 – May 24, 2014; area code 727 – May 25, 2014; and area codes 352 and 941 – May 26, 2014. (BLP000107). BLP paid FaxQom $14,766.92 for this round of broadcasts. (*Id.*)

On May 24, 2010, Plaintiff Medical & Chiropractic received the group tickets advertisement at its area code 813 fax number, according to schedule. (Biggerstaff Decl. ¶ 7). The opt-out notice states, "If your office has decide to opt-out of further faxes please call 866-247-0920. Thank you." (Biggerstaff Report, Ex. 2, at RMI00221). FaxQom changed the opt-out notice at Kaiser's direction to "keep it simple and only related to opting out" (BLP00310), removing the reference to an "opt-in compiled database" from the previous two notices.

On May 28, 2010, BLP ordered "group tickets" faxes to be sent the following "tuesday through friday," June 1–4, 2010. (BLP00325). On June 1, 2010, Kaiser complained that FaxQom had not sent "a signed copy of the order form" (BLP00326) with new indemnification language Kaiser had written, extending to BLP "employees" (BLP00306). On June 3, 2010, Kaiser told

FaxQom not to send any more faxes until it sent back the signed indemnification language. (BLP00330). FaxQom obeyed. (BLP00336). On June 7, 2010, FaxQom sent its signature on the new indemnification language, and BLP authorized FaxQom to resume faxing. (BLP00343).

On June 7, 2010, FaxQom reported area code 352 "will complete tomorrow morning," and Kaiser told FaxQom to "finish 727 on Tuesday, Wednesday, and Thursday." (BLP00631). The opt-out notice on the June 2010 faxes states, "If your office has decide to opt-out of further faxes please call 866-247-0920. Thank you." (Biggerstaff Report, Ex. 2, at RMI00265, 276, 283, 290). On June 9, 2010, Kaiser told FaxQom to stop faxing, and FaxQom obeyed. (BLP00350).

Beginning with the August 2009 faxes, FaxQom began using a company called Rocket Messaging, Inc. ("RMI") to transmit BLP's faxes. (Jenkins Declaration ¶¶ 2, 5). Plaintiffs subpoenaed RMI, and its keeper of records, Ian Jenkins, produced transmission logs, billing statements, and the images sent in 22 broadcasts of BLP faxes from August 17, 2009, through June 9, 2010, along with a Declaration authenticating the documents and explaining the sequence of the BLP faxes. (*Id.* ¶¶ 14–36).

BLP took Jenkins's deposition, individually and as RMI's corporate representative. (Jenkins Dep. at 6). Jenkins testified that RMI provides a "fax messaging service," allowing "wholesale customers" to send a "high volume" of faxes and "retrieve results on if those faxes were delivered or not." (*Id.* at 31–32). Jenkins testified that his role at RMI is "application developer" and he developed RMI's "fax broadcasting platform." (*Id.* at 33–34).

Jenkins testified that RMI's platform automatically creates a "call detail record" for each fax broadcast, which includes the target fax numbers, the date and time of transmission, and a "status code" for each individual transmission. (*Id.* at 112). Jenkins testified the "call detail records" are the same documents he referred to as "transmission records" in his declaration. (*Id.*

at 148). Jenkins testified the "status code" in the call detail/transmission records reflects "the outcome of the fax," where "a status code of zero is a successfully delivered fax" and "[a]nything other than zero is an error code that has different reasons," such as "busy, no answer, things of that nature." (*Id.* at 112). Jenkins testified "the fax protocol is a very standard thing," and "[s]o long as the recipient fax machine says it received the fax, we will get a status code of zero," regardless of what device is on the receiving end. (*Id.* at 113). Jenkins testified the transmission records also contain a field for the "CSID" of each transmission, which is "a call subscriber identifier" that is sent by the receiving device to the sending device. (*Id.* at 119).

Jenkins testified that he "actually look[ed] at the images that were sent out" and "compare[d] each and every one of them" with the transmission records. (*Id.* at 161). Jenkins could not recall a client asking "about whether or not the transmission record is accurate about the number of successful transmissions" but testified that if ever asked whether a particular number received a fax, RMI would simply "provide the transmission record," since "one of the pieces on there is the CSID which is information that we can't fabricate that has to come from that receiving machine." (*Id.* at 165).

Biggerstaff reviewed the RMI transmission records and concluded they show "120,232 unique fax numbers received 240,596 successful error-free transmissions, indicated by STATUS '0' in the logs, ranging in dates from August 17, 2009, to June 9, 2010 (inclusive)." (Biggerstaff Report ¶ 16). Biggerstaff explained that facsimile machines communicate using the "T.30" protocol, "whereby a fax transmission is positively confirmed by the receiving machine before the sending machine will record the transmission as successful," through a "positive confirmation of receipt of the transmission (e.g. the message confirmation or 'MCF')." (*Id.* ¶¶ 29, 46). Biggerstaff stated that in his experience transmission records are "highly reliable and

accurate, particularly when identifying particular fax transmissions as fully received error-free transmissions." (*Id.* ¶ 53).

Combining the USADatalink/127 High Street transmissions and the RMI transmissions, Biggerstaff concluded that "[t]he records I examined identified 131,011 unique fax numbers that received a combined 343,122 successful error-free transmissions containing advertisements for Tampa Bay Buccaneers tickets." (*Id.* ¶ 54).

Relevant Procedural History

Plaintiff Cin-Q filed this action on June 15, 2013, with a Second Amended Complaint ("SAC"), adding Medical & Chiropractic on January 3, 2014 (Doc. 70). On April 8, 2014, BLP filed an Amended Answer, denying the faxes attached to the SAC are "advertisements" (Doc. 119 ¶ 38), denying BLP "sent" the faxes (*id.* ¶¶ 14–15), and denying the faxes lack compliant opt-out notice (*id.* ¶ 24). BLP asserted 15 affirmative defenses, including that "BLP is not vicariously liable" for the faxes (Third Aff. Defense), that "Plaintiff and potential class members had an established business relationship with BLP" (Eleventh Aff. Defense), and that "Plaintiff and potential class members invited faxes by advertising or displaying their fax numbers publicly" (Twelfth Aff. Defense). BLP demanded a trial by jury. (Doc. 119 at 9).

BLP sought leave to seek summary judgment against Plaintiffs individually on "vicarious liability" prior to class certification, which the Court allowed, and the parties filed cross-motions for summary judgment. (Docs. 129 & 138). BLP argued it cannot be held "vicariously liable" for the faxes. (Doc. 129). Plaintiffs argued BLP is directly liable as the "sender" as defined by FCC regulation, 47 C.F.R. § 64.1200(f)(10), because it is the person or entity "on whose behalf" the faxes were sent and, independently, because BLP is the person or entity "whose goods or services are advertised or promoted" in the faxes. (Doc. 138 at 10–13).

On December 17, 2014, the Court denied both parties summary judgment. (Order, Doc. 167). The Court held BLP was incorrect that a plaintiff must prove vicarious liability, given that the FCC explained as amicus in *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1252 (11th Cir. 2015), that the "sender" is directly liable and the Eleventh Circuit accepted that position. (*Id.* at 7–8). The Court also held Plaintiffs were incorrect that BLP is the "sender" under the 2006 regulation solely because its "goods or services" are advertised in the faxes, holding the sender must also be the person "on whose behalf" the fax is sent. (*Id.* at 9–10). The Court declined to decide whether BLP is the person "on whose behalf" the faxes were sent, ruling that a jury should decide the question. (*Id.* at 15–16).

On January 8, 2015, BLP filed a Motion to Bifurcate and Proceed Directly to Trial on Liability as to Plaintiffs individually. (Doc. 169). On January 14, 2015, Plaintiffs moved to reconsider the denial of summary judgment or certify questions for appeal. (Doc. 170). On May 5, 2015, the Court denied both motions. (Doc. 181). On July 28, 2015, the Court directed Plaintiffs to file their motion for class certification by January 14, 2016, which the Court later extended twice at the parties' request to March 25, 2016. (Docs. 200 & 202).

Argument

To obtain class certification on their TCPA claims,[3] Plaintiffs must establish the Rule 23 elements by a simple preponderance of the evidence. *See In re HealthSouth Corp. Sec. Litig.*, 261 F.R.D. 616, 624 (N.D. Ala. 2009). There are four Rule 23(a) requirements: numerosity, commonality, typicality, and adequacy of representation; and two Rule 23(b)(3) requirements: that common questions "predominate" and that a class action is "superior" compared to the

[3] Like the plaintiff in *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 311 F.R.D. 688, 692 n.6 (S.D. Fla. 2015), Plaintiffs do not seek class certification on their conversion claims, Count II of the SAC.

alternatives. There is also an implied requirement that the classes be "ascertainable." As argued below, these standards are easily satisfied here.

I. The proposed classes are "ascertainable."

A. The circuit split on ascertainability and Eleventh Circuit authority.

There is a circuit split on what "ascertainability" means in a Rule 23(b)(3) class action. In *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015), the Seventh Circuit concluded ascertainability concerns "the adequacy of the class definition itself" and is limited to whether the class is "defined clearly and based on objective criteria." The Seventh Circuit held ascertainability does *not* ask whether "it would be difficult to identify particular members of the class" and rejected the Third Circuit's "heightened" approach, which requires a "reliable and administratively feasible way to identify all who fall within the class definition." *Id.* (rejecting *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013)).

The Seventh Circuit held "[n]othing in Rule 23 mentions or implies this heightened requirement" and "existing requirements already address" class-member identification for providing the "best notice practicable" and distributing any recovery, primarily the "manageability" aspect of Rule 23(b)(3) superiority. *Id.* The Seventh Circuit concluded a class of "purchasers" was ascertainable under the traditional standard because the definition was (1) not "vague," (2) not based on subjective criteria "such as a person's state of mind," and (3) not a "fail-safe class," where the class is defined in terms of success on the merits. *Id.* at 660–61.[4]

In *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015), the Sixth Circuit agreed with *Mullins*, holding "[w]e see no reason to follow *Carrera*, particularly given the strong criticism it has attracted from other courts," and affirmed classes of persons who "purchased" the

[4] The Supreme Court denied certiorari in *Mullins*. 2016 WL 763259 (Feb. 29, 2016).

defendant's products, even though they purchased through retailers and the defendant manufacturer did not have records of purchase. The Sixth Circuit held an "identification" requirement would allow a "systemic failure" in a defendant's "records management" to defeat class certification and "undermine the very purpose of class action remedies." *Id.* at 525–26. The Sixth Circuit noted no other circuit has adopted the heightened standard and the Third Circuit itself has backed away from it. *Id.* at 526, n.10 (citing *Byrd v. Aaron's Inc.*, 784 F.3d 154, 170–71 (3d Cir. 2015) (reversing order finding subclass of "household members" unascertainable, holding "a process of identification does not require a 'minitrial,' nor does it amount to 'individualized fact-finding,'" and "indeed must be done in most successful class actions")).

The Eleventh Circuit has only one published decision mentioning "ascertainability," stating in dicta that a class must be "adequately defined and clearly ascertainable." *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012) (quoting *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970)). The Eleventh Circuit did not analyze ascertainability in *Little*, holding it could "assume" the district court was "wrong about whether the class was ascertainable and numerous" yet still affirm the denial of class certification because the plaintiffs failed to dispute on appeal that predominance was lacking. *Id.* at 1307–08.

In *DeBremaecker*, the pre-1980 Fifth Circuit case cited in *Little*, the district court ruled a class of "residents of this State active in the 'peace movement'" who had been harassed by Houston police was not ascertainable. 433 F.2d at 734. The Fifth Circuit affirmed, holding the class definition was "overbroad" for two reasons: (1) the "uncertainty of the meaning of 'peace movement'" and (2) the fact that harassment by Houston police could not have harmed "residents of this State" (Texas) who resided "outside the City of Houston." *Id.*

Since *Little* associated ascertainability with whether the class as defined was sufficiently "numerous" and *DeBremaecker* focused on whether the definition was "overbroad," it appears the Eleventh Circuit follows traditional ascertainability, focusing on whether the class is defined objectively, and considers identifying class members for purposes of giving class notice or distributing any recovery under Rule 23(b)(3) manageability, like the Sixth and Seventh Circuits.

Nevertheless, the Seventh Circuit observed in *Mullins* that the Eleventh Circuit applied "a fairly strong version of an ascertainability requirement in a non-precedential decision" in *Karhu v. Vital Pharm., Inc.*, 2015 WL 3560722, at *2 (11th Cir. June 9, 2015) (unpublished) (affirming denial of certification to class of "purchasers" of dietary supplement, where defendant's records showed sales only to retailers, not end-user consumers).[5] *Mullins*, 795 F.3d at 661. Therefore, Plaintiff addresses both traditional ascertainability and the heightened Third Circuit standard below. Both standards are satisfied in this case.

B. The class definitions satisfy traditional ascertainability.

Plaintiffs seek to certify three classes of persons "successfully sent" faxes, with the definitions reflecting the dates the faxes were sent and the three varieties of opt-out notice. A class of persons "successfully sent" faxes containing particular content during a particular time frame is defined by "objective" criteria. *Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 757 F.3d 540, 545 (6th Cir. 2014). As in *Mullins*, the proposed class definitions are not "vague," but rather "identif[y] a particular group," that was "harmed in a particular way" during "a specific period." 795 F.3d at 660–61. The definitions are not based on a subjective "state of mind," but on objective criteria of whether a person was sent one or more of the identified faxes.

[5] Unpublished Eleventh Circuit decisions are not binding on the Eleventh Circuit or this Court. *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1215 n.10 (11th Cir. 2011).

Id. And the definitions are not "fail-safe," since they do not entail any conclusions on the merits, such as whether the faxes are "advertisements" or whether the opt-out notice is non-compliant. *Id.* The class definitions are therefore ascertainable under the traditional standard.

Two district courts in the Eleventh Circuit have applied traditional ascertainability, focusing on whether the class definitions were objective, in certifying TCPA fax classes. First, in *A Aventura Chiropractic Ctr., Inc. v. Med Waste Mgmt. LLC*, 2013 WL 3463489, at *5 (S.D. Fla. July 3, 2013), the court certified a class of persons "sent" the faxes, holding that "[d]efining the class as those to whom Med Waste sent the offending facsimiles is a concrete way to identify Med Waste's intended recipients and obviates the need for considering multiple ownership of fax machines or instances where the owners themselves may not have experienced a loss upon receipt of a non-compliant fax advertisement" and that "[d]efining the class in this way is also consistent with the text of the TCPA," which prohibits the "sending" of a fax.

Second, in *C-Mart, Inc. v. Metro. Life Ins. Co.*, 299 F.R.D. 679, 689 (S.D. Fla. 2014), the court held a class of persons "sent" the defendants' faxes was "ascertainable and adequately defined," because "to define class membership as those whom Defendants sent the fax is in line with TCPA's language regarding sending faxes, and would allow a concrete way to identify Defendants' intended recipients." The court held that "[t]o define the class otherwise would ignore the TCPA's emphasis on prohibiting parties from sending offending faxes." *Id.*

Defendants sometimes argue a TCPA class is not ascertainable because individualized inquiries are required into which class members had an EBR with the defendant or gave "prior express invitation or permission." That objection fails at the starting gate because it has to do with whether common issues "predominate" under Rule 23(b)(3), not "ascertainability." More important, neither EBR nor prior express permission are available to BLP because its faxes lack

compliant opt-out notice. *A Aventura*, 2013 WL 3463489, at *3 ("[T]he sole issue in ascertaining class membership is whether in solicited and unsolicited advertisements the required opt-out language was included."); *C-Mart*, 299 F.R.D. at 688 (rejecting ascertainability challenge because "established relationship or voluntary consent defenses are unavailable where, as here, the opt-out requirement is alleged to have been violated").

In sum, the proposed classes are defined by objective criteria and the definitions easily meet traditional ascertainability. The Court should proceed to consider the Rule 23(a) factors.

C. The classes satisfy heightened ascertainability.

On remand from the Eleventh Circuit's decision reversing summary judgment for the defendant in *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1252 (11th Cir. 2015), the district court applied heightened ascertainability at class certification, requiring the plaintiff to show that "identifying class members" would be "a manageable process that does not require much, if any, individual inquiry." *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 311 F.R.D. 688, 693 (S.D. Fla. Aug. 5, 2015) (quoting *Bussey v. Macon Cnty. Greyhound Park, Inc.*, 562 Fed. App'x 782, 787 (11th Cir. 2014) (unpublished)).

The plaintiff in *Sarris* defined the class as "[a]ll persons who were sent one or more facsimiles on December 13, 2005 or December 14, 2005, from 'John G. Sarris, D.M.D., P.A.' offering 'Family, Cosmetic & Reconstructive Dentistry' and serving as a $50 'Gift Certificate.'" *Id.* at 692. The plaintiff relied on Biggerstaff's testimony that the transmission logs obtained from the fax broadcaster showed "an error-free transmission of a one-page fax to 7,058 unique fax numbers," including the plaintiff's number. *Id.* The defendant argued the class was not ascertainable because (1) it could be held liable only for faxes it "authorized" and so the definition was overbroad and (2) "the identifying information in the Biggerstaff report is out of

date and extremely unreliable," since "33-40% of the fax numbers are no longer in use, making it difficult to locate and identify a substantial portion of the class." *Id.* at 693.

The district court rejected both objections, certifying the class and holding (1) the "authorization" issue was a merits question, and if the defendant established it was not liable for certain transmissions, the court could "modify the class definition to comport with the evidence and exclude those transmissions" and (2) the court could "address any issues or due process concerns with respect to locating and notifying class members after the class is certified." *Id.* at 694. The court held the proposed class, when "supported by a report like the Biggerstaff report," satisfied the "implicit ascertainability and administrative feasibility requirement."[6] *Id.*

In *Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC*, 2014 WL 7366255, at *4 (S.D. Fla. Dec. 24, 2014), the district court applied the heightened ascertainability standard in a TCPA fax class action, requiring the plaintiff to show it was "possible to identify the class members on the basis of 'objective criteria' and through a 'manageable process that does not require much, if any, individual inquiry.'" The plaintiff relied on Biggerstaff's analysis of the fax logs and his opinion that the fax "was successfully sent to and received by 4,324 unique recipients." *Id.* The court ruled ascertainability was satisfied and certified a class of persons who "received" faxes, holding "Biggerstaff's methodology is sound and reliable, and it provides a manageable process for identifying class members using objective criteria."[7] *Id.*

[6] Following class certification, the defendant won partial summary judgment that it was not the "sender" with respect to more than half the faxes at issue. *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, No. 12-80178, Order, Doc. 174, at 23 (S.D. Fla. Mar. 10, 2016).

[7] Following class certification, the sole remaining defendant prevailed at trial, obtaining a classwide judgment that he was not a "sender" of any of the faxes. *Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC*, 2015 WL 3644598, at *4 (S.D. Fla. June 10, 2015).

District courts in the Third Circuit, the only circuit that has adopted the heightened standard, have reached different results in TCPA fax class actions depending on whether the target fax numbers and/or transmission logs are available. In *City Select Auto Sales, Inc. v. BMW Bank of N. Am. Inc.*, 2015 WL 5769951, at *7 (D.N.J. Sept. 29, 2015), the court held the class was not ascertainable where there was no "master list" of fax numbers and no transmission logs. The plaintiff had billing invoices from the broadcaster showing "the total number of faxes sent on various dates," but they did not "reflect the individual fax numbers to which the faxes were sent" and so the district court held the heightened standard was not satisfied. *Id.*

In contrast, the same court in *City Select Auto Sales, Inc. v. David Randall Assocs., Inc.*, 296 F.R.D. 299, 313–14 (D.N.J. 2013), held that a class of persons "successfully sent" faxes was ascertainable where the plaintiff had the transmission logs "showing 29,113 unique fax numbers" successfully sent faxes and held the numbers were objective evidence that would allow identification of class members "through the claims administration process," after class members were sent notice and filed claims for any recovery. *Id.*

In this case, with respect to Class A, covering persons sent faxes July 14–16, 2009, Plaintiffs have the lists of fax numbers and the "exception reports" showing unsuccessful transmissions. (Biggerstaff Report ¶ 19). Biggerstaff explains that in his experience the presence of a number on the target list but not the exception reports indicates that "a fax was sent to this number and was a successfully received error-free transmission" of a BLP fax. (*Id.* ¶ 27). Thus, even under the heightened Third Circuit standard, ascertainability is met for Class A.

With respect to Class B, covering persons sent faxes August 17–20, 2009, Plaintiffs have the transmission logs from RMI, showing the fax numbers and the date, time, and "status code" of each transmission showing whether it successfully completed the T.30 protocol. (*Id.* ¶ 46).

The same is true for Class C, consisting of persons sent BLP faxes from May 24, 2010, through June 9, 2010, for whom Plaintiffs also have the RMI transmission records.[8] (*Id.*)

Transmission records are definitive evidence in a TCPA fax case. Biggerstaff explains that under the T.30 protocol, "a fax transmission is positively confirmed by the receiving machine before the sending machine will record the transmission as successful." (*Id.* ¶ 29). These records are "highly reliable and accurate, particularly when identifying particular fax transmissions as fully received error-free transmissions." (*Id.* ¶ 53). "Transmitting a fax requires a sending and a receiving machine to communicate using a standard protocol," and "no reasonable juror could conclude that these data are inaccurate." *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 684–85 (7th Cir. 2013) (affirming class certification and summary judgment for plaintiff class based on transmission records and Biggerstaff's report). The transmission records for Classes B and C satisfy any standard for ascertainability, even the Third Circuit's heightened standard. *See David Randall Assocs.*, 296 F.R.D. at 313–14.

D. There is no need to amend the class definition in the SAC.

Plaintiffs' three-class proposal differs from the singular definition in the SAC by specifying the dates of the faxes and quoting the three varieties of opt-out notice, rather than referring generally to persons "sent facsimile advertisements offering group tickets or individual game tickets for the Tampa Bay Buccaneers games and which did not display the opt out language required by 47 C.F.R. 64.1200." (SAC ¶ 25). Such modifications are common in class litigation to focus the class definition as the case develops. *See Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1273 (11th Cir. 2000) ("Rule 23(c)(1) specifically empowers district courts to alter or amend class certification orders at *any* time prior to a decision on the merits."); *Shin v.*

[8] Plaintiffs propose separate classes B and C to reflect the different time periods and opt-out notice.

Cobb Cnty. Bd. of Educ., 248 F.3d 1061, 1064 (11th Cir. 2001) (court retains "the ability, and perhaps even a duty, to alter or amend a certification decision" as case develops).[9]

Nevertheless, defendants sometimes argue a class definition cannot be altered from complaint to class certification without amending the pleadings. There is no such requirement. *Chapman v. First Index, Inc.*, 796 F.3d 783, 785 (7th Cir. 2015) (holding a complaint need not contain a class definition at all under Rule 8 and "motions practice and a decision under Rule 23 do not require the plaintiff to amend the complaint"). Also, the SAC states "Plaintiffs reserve the right to amend the class definition upon completion of class certification discovery," putting BLP on notice. (SAC ¶ 25). In *C-Mart*, 299 F.R.D. at 685 n.5, the court certified a TCPA fax class over the defendants' objection that the definition improperly differed from the complaint where the complaint advised "that the class definition might be modified . . . after discovery."

In sum, the proposed classes are objectively defined and "ascertainable" under both the traditional standard and the heightened Third Circuit standard, and Plaintiffs need not amend the SAC to obtain class certification. Alternatively, if the Court believes an amendment is necessary, Plaintiffs seek leave to file a Third Amended Complaint pleading the three class definitions. The Court should hold ascertainability satisfied and proceed to the Rule 23(a) factors.

II. The Rule 23(a) elements are met.

A. The class is sufficiently numerous.

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." A plaintiff need not show the "exact number" or "identity of the class members," and the district court may make common-sense estimates. *A Aventura*, 2013 WL 3463489, at *3;

[9] *See also Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 618–19 (6th Cir. 2007) (court had "obligation to make appropriate adjustments to the class definition as the litigation progressed"); *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004) (courts "permitted to limit or modify class definitions to provide the necessary precision"); *Smith v. Pennington*, 352 F.3d 884, 894 (4th Cir. 2003).

Cheney v. Cyberguard Corp., 213 F.R.D. 484, 490 (S.D. Fla. 2003). The Eleventh Circuit presumes that "less than twenty-one is inadequate, more than forty adequate." *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir.1986). In this case, the evidence shows 343,122 fax transmissions sent to 131,011 fax numbers in the Tampa area from July 2009 to June 2010. (Biggerstaff Report ¶ 54). There is no reasonable basis to dispute numerosity.

B. There is at least one common question of law or fact.

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." There need only be "at least one" common question. *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1355 (11th Cir. 2009). Here, there are four common questions:

(1) whether the faxes are "advertisements" as defined by 47 C.F.R. § 64.1200(f)(1), which BLP denies (Amended Answer, Doc. 119, ¶ 38);

(2) whether BLP is a "sender" of the faxes, defined as any "person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement," 47 C.F.R. § 64.1200(f)(10), which is the issue the Court identified for trial (Order, Doc. 167, at 15–16);

(3) whether the opt-out notice on the faxes violates the governing FCC regulations, thus precluding BLP's affirmative defenses of EBR or "prior express invitation or permission," 47 C.F.R. § 64.1200(a)(4)(ii)–(iv);[10] and

[10] EBR and "prior express invitation or permission" are defenses on which the fax sender bears the burden of proof. *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd. 3787, ¶ 12 (Apr. 6, 2006) ("[T]he burden will be on the sender to show that it has a valid EBR with the recipient."); *id.* ¶ 46 ("In the event a complaint is filed, the burden of proof rests on the sender to demonstrate that permission was given.").

(4) whether BLP "willfully or knowingly" violated the TCPA or FCC regulations and, if so, whether the Court should increase statutory damages from $500 per violation to up to $1,500 per violation,[11] along with whether injunctive relief is appropriate and the scope of such relief.

The Court need not, and should not, decide these questions now. It need only determine whether the "*answers*" to these questions are "apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). There is no reasonable basis to dispute that at least one common question of law or fact exists in this case under Rule 23(a)(2). The more demanding standard of whether common questions "predominate" over individual questions is addressed under Rule 23(b)(3), below.

C. Plaintiffs' claims are typical of the other class members.

Rule 23(a)(3) requires the plaintiff's claims be "typical" of the class. A plaintiff's claim is "typical" where it shares "the same essential characteristics as the claims of the class at large." *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985). A "strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences." *Id.* A "sufficient nexus" is established "if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984).

In this case, Plaintiffs' claims are typical of the "class at large" because they were sent BLP's fax advertisements. Medical & Chiropractic's claims are especially "typical" of Class A because it received a BLP fax on July 15, 2009, during the campaign from July 14–16 promoting group tickets to Buccaneers games. (Biggerstaff Report ¶ 27). Medical & Chiropractic's claims

[11] In *Lary v. Trinity Physician Fin. & Ins. Servs.*, 780 F.3d 1101, 1106 (11th Cir. 2015), the Eleventh Circuit held the TCPA provides $500 per "violation," with "no language limiting the recovery to $500 per 'call' or 'fax,'" and found the defendant liable for two TCPA violations in a single fax transmission.

are also typical of Class C because it received another BLP fax on May 24, 2010, in a multi-day campaign to promote Buccaneers group tickets. (Biggerstaff Decl. ¶ 7). Plaintiff Cin-Q's claims are typical of Class B because it received a BLP fax on August 19, 2009, as part of a four-day faxing campaign promoting individual tickets. (Biggerstaff Report ¶ 25).

Although Plaintiffs were not targeted in every broadcast, since BLP targeted different area codes on different days, that does not make their claims atypical. In *A Aventura*, 2013 WL 3463489, at *4, the court noted the plaintiff's "fax number does appear on earlier versions of the list of numbers," but held that merely "confirm[ed] that multiple fax blasts were sent out" for the same product, thus "resolving any concerns about typicality." The court held that, although the plaintiff was not targeted in every broadcast, "the course of conduct that produced its TCPA claim also produced the claims of the proposed class," making its claims typical. *Id.* Here, BLP's "course of conduct" in sending faxes advertising Buccaneers tickets to numbers in the Tampa area gave rise to Plaintiffs' claims and the claims of the classes, and typicality is easily satisfied.

D. Plaintiffs and their counsel will adequately represent the class.

1. Plaintiffs are adequate class representatives.

Rule 23(a)(4) adequacy aims to prevent "conflicts of interest between the named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). The required "threshold of knowledge" is low; a "working knowledge" of the case is enough. *Bacon v. Stiefel Labs., Inc.*, 275 F.R.D. 681, 694 (S.D. Fla. 2011). A plaintiff generally need not "pursue with vigor the legal claims of the class." *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987). An attack on "lack of knowledge" is "particularly meritless" where "investigation and discovery by counsel against a background of legal knowledge" is required. *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430 (4th Cir. 2003); *Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 222 F.3d 52, 61 (2d Cir. 2000) (*Surowitz v. Hilton Hotels Corp.*,

383 U.S. 363 (1966), "expressly disapproved of attacks on the adequacy of a class representative based on the representative's ignorance"). Here, Plaintiffs exceed these minimal standards.

Plaintiff Cin-Q is a small business in Gainesville, Florida, that sells used cars and recreational vehicles. (Cinque Dep. at 65). Cinque's president, Craig Cinque, sat for a 6.5-hour deposition on February 14, 2014, where defense counsel questioned him extensively on subjects ranging from his days as a bar owner in the 1990s, to his wife's talent agency, to whether his eight-year-old son is a Buccaneers fan. (*Id.* at 25–31, 46, 123).

With respect to this case, Cinque testified he remembers receiving the individual game tickets fax dated August 19, 2009, on Cin-Q's fax machine at fax number (352) 377-9774. (*Id.* at 46–47, 49–50, 268). Cinque testified this fax "stuck out" to him because most junk faxes do not "say who it is" the fax is from, but this fax made clear it was from the Buccaneers. (*Id.* at 55–56). Cinque testified that, shortly after receiving the Buccaneers fax, he complained about junk faxes to an attorney who had come into the shop on an unrelated matter, and the attorney asked him if he wanted to "do something about it." (*Id.* at 41, 54). Cinque testified one reason he decided to pursue this action is that small businesses like his have to comply with the law and a big business like BLP should "be on the same level playing field as everybody else." (*Id.* at 217).

Cinque testified he understands this is a class action, "where it's not feasible . . . to name every single plaintiff" and "it's not worth to have 10,000 cases of the exact same case brought to court." (*Id.* at 160–61). Cinque understands this case is brought under the TCPA, which provides damages of "500 to 1500" per fax. (*Id.* at 148–49). Cinque believes he and "[e]verybody else that got a fax" from BLP have "the same shared interest" and answered "no" to defense counsel's question, "[i]f you could get money but they don't get money, will you settle the case?" (*Id.* at 151). Cinque is willing to travel to Tampa for hearings or trial if necessary. (*Id.* at 216).

Plaintiff Medical & Chiropractic is a small chiropractic clinic with offices in Tampa and Zephyrhills, co-owned by married couple Michelle Zakrzewski and Dr. Gregory Williams. (Zakrzewski Dep. at 21). Zakrzewski testified as Medical & Chiropractic's corporate representative on February 12, 2014, where she testified that Medical & Chiropractic received the July 15, 2009, fax on its fax machine at the Tampa location connected to fax number (813) 237-3792. (*Id.* at 9–11). Zakrzewski testified that Medical & Chiropractic has had that fax number since 1994. (*Id.* at 122). Zakrzewski testified she has been to two Buccaneers games in her life and agreed with defense counsel that the tickets purchased for those games constituted a "good or a service offered by the Buccaneers . . . ." (*Id.* at 115).

Asked by defense counsel whether "if you were offered to be made whole for whatever your losses are to the extent there are any, would you be willing to walk away?," Zakrzewski answered "I'd have to think about all the other people that might be involved." (*Id.* at 192). Informed by defense counsel that BLP would seek its "fees and costs if you lose"[12] and that the amount of those fees and costs could threaten "the risk of your business," Zakrzewski stated, "I started this, so I have to stand behind it." (*Id.* at 200–01).

The named Plaintiffs in this case will be exceptional class representatives, and the Court should appoint them. Plaintiffs have demonstrated they will not allow BLP to buy them off or intimidate them, they have been engaged in this case, devoting the time to sit for full-day depositions, and they have the basic "working knowledge" necessary. Medical & Chiropractic received faxes in the July 2009 and May–June 2010 broadcasts, making it an ideal representative for Classes A and C. Cin-Q received a fax in the August 2009 broadcasts, making it an ideal

[12] The TCPA does not allow fee shifting. *Bauer v. Midland Credit Mgmt., Inc.*, 2012 WL 6733649, at *7 (M.D. Fla. Dec. 4, 2012); 47 U.S.C. § 227(b)(3).

representative for Class B. If for any reason the Court finds these representatives inadequate, Plaintiffs request 30 days to substitute new class representatives.

2. Plaintiffs' attorneys are adequate class counsel.

Proposed class counsel Anderson + Wanca consists of seven experienced TCPA and class-action litigators. (*See* A+W Firm Resume). A+W has regularly been appointed class counsel in TCPA actions, including in this circuit. *E.g.*, *Doctor Diabetic*, 2014 WL 7366255, at *6 ("Anderson & Wanca is one of very few firms that specialize in TCPA class actions and so is knowledgeable of the applicable law and experienced in litigating TCPA classes."); *A Aventura*, 2013 WL 3463489, at *4. A&W has been appointed in dozens of federal cases outside this Circuit. *E.g.*, *In re SamMichaels, Inc.*, No. 12-0110, 2013 WL 1760353, at *1 (6th Cir. Apr. 25, 2013) (rejecting appeal challenging A+W's adequacy); *Siding & Insulation Co. v. Combined Ins. Grp., Ltd., Inc.*, 2012 WL 1425093, at *4 (N.D. Ohio Apr. 24, 2012) (finding A+W "sufficiently experienced and qualified to handle class actions" and "[t]here is no indication Counsel will be unable to commit the necessary resources to properly represent the class"). A+W has devoted significant resources to this case, and it will continue to do so.

Proposed co-class counsel, Michael Addison, is a Board Certified Civil Trial Lawyer and Board Certified Business Litigation Lawyer and practices exclusively in litigation and appellate practice, with a focus upon complex commercial matters and representation of claimants in consumer class action litigation. (*See* Addison Biography). Mr. Addison has played a central role in the litigation over BLP's fax campaign since he filed the first such lawsuit in August 2009.

III. The Rule 23(b)(3) elements are met.

A. Common issues predominate over individual issues.

Rule 23(b)(3) requires that common questions "predominate" over individual questions. Predominance "asks whether the common, aggregation-enabling, issues in the case are more

prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, --- S. Ct. ---, 2016 WL 1092414, at *7 (U.S. Mar. 22, 2016). Common issues predominate in TCPA fax cases, since "[t]he facts necessary to establish liability relate to Defendant's common course of conduct and the transmissions of the faxes, and not to issues with individual class members" and "class members' claims are brought under the same federal statute and based on the same legal theories." *Sarris*, 311 F.R.D. at 699.

In this case, the answers to four common questions will determine liability and damages for every class member: (1) whether the faxes are "advertisements," (2) whether BLP is the "sender," (3) whether the faxes lack compliant opt-out notice, and (4) whether the violations were willful or knowing. There is nothing "individualized" about these issues.

First, the faxes are either advertisements or they are not. The answer will not vary by class member, and it is unclear on what basis BLP intends to dispute this point, given that the faxes plainly offer tickets to Buccaneers football games for commercial sale.

Second, BLP is either the "sender" or it is not. Plaintiffs maintain that BLP is the sender under the plain language of 47 C.F.R. § 64.1200(f)(10) because its "goods or services are advertised or promoted" and BLP cannot challenge the validity of that regulation in this Court. *See Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119–20 (11th Cir. 2014); *Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1307 (11th Cir. 2015). Plaintiffs recognize this Court disagreed in its summary-judgment ruling, but that order was based on the Eleventh Circuit's decision in *Sarris*, which applied a 1995 FCC ruling to faxes sent before the definition of "sender" was promulgated in 2006. 771 F.3d at 1284 & n.7. Since then, the Sixth Circuit has held in a case involving post-2006 faxes that "[t]he pertinent FCC regulations are explicit that the party whose goods or services are advertised . . . is the sender" and held the

defendant "directly liable" solely because the faxes advertised its restaurant. *Imhoff Inv., LLC v. Alfoccino, Inc.*, 792 F.3d 627, 636 (6th Cir. 2015).[13] On remand, the district court certified the class, holding "the TCPA provides for direct liability against a defendant whose goods or services are advertised in the fax at issue, even if that party did not broadcast the fax." *Avio, Inc. v. Alfoccino, Inc.*, 2015 WL 8731983, at *3 (E.D. Mich. Dec. 14, 2015).

Even if this Court limits the "sender" inquiry to whether the faxes were sent "on behalf of" BLP, the answer to that question does not require individualized inquiries. This Court held "on behalf of" liability turns on a "totality test based loosely on agency principles, aimed at establishing the origin of the offending behavior." (Doc. 167 at 13). There is no reason a jury would find BLP the "origin of the offending behavior" with respect to one class member but not another. BLP maintains that *none* of the faxes were sent on its behalf, not that some were and some were not. Plaintiffs contend BLP's arguments fail on the merits, given that BLP hired a fax broadcaster, designed the advertisements, and controlled the timing of the broadcasts and the area codes targeted. But this is the question the Court identified for trial. (*Id.*)

The "persuasiveness" of the evidence at trial is "the near-exclusive province of the jury." *Tyson Foods*, 2016 WL 1092414, at *11. But for purposes of class certification, where "the concern about the proposed class is not that it exhibits some fatal dissimilarity but, rather, a fatal similarity—[an alleged] failure of proof as to an element of the plaintiffs' cause of action—courts should engage that question as a matter of summary judgment,"' or trial on the merits, "not class certification." *Id.* at *9; *id.* at *11 ("The District Court could have denied class certification on this ground only if it concluded that no reasonable juror could have believed that

[13] The Sixth Circuit also noted the defendant could not challenge the validity of § 64.1200(f)(10) in private litigation "because the Hobbs Act confers jurisdiction on Courts of Appeal to review FCC regulations only by direct appeal from the FCC." *Imhoff*, 792 F.3d at 637.

the employees spent roughly equal time donning and doffing."). In sum, there is nothing class-member specific about the parties' arguments for or against "on behalf of" liability, and the jury can decide the issue without individualized inquiry.

BLP might argue a jury could reach different conclusions based on whether faxes were sent through USADatalink/127 High Street (July 2009), or through RMI (August 2009 and May–June 2010). Plaintiffs do not see why that would be the case, but their proposed three-class structure accommodates the possibility. If the jury finds the USADatalink/127 High Street faxes were sent "on behalf of" BLP, but not the RMI faxes, then Class A will prevail on the "sender" issue but Classes B & C will not. If the jury finds the RMI faxes were sent "on behalf of" BLP, but not the USADatalink/127 High Street faxes, then Classes B & C will prevail but Class A will not. Regardless of the outcome, the "sender" issue is capable of classwide determination.

Third, the opt-out notice on the faxes is either compliant or it is not. With respect to the notice on the faxes sent to Classes A & B, which differ only in the phone number provided, the notice (1) is not "clear and conspicuous," (2) does not provide a fax number for opt-out requests, (3) does not advise that a sender's failure to comply with an opt-out request within 30 days is unlawful, and (4) does not advise that the recipient must use the means identified on the fax to make an enforceable request, all in violation of 47 C.F.R. § 64.1200(a)(4)(iii). The notice on the second page of the two-page faxes sent to Class A also violates the requirement that the notice be "on the first page of the advertisement." *Id.* The opt-out notice on the one-page faxes sent to Class C suffers all the same flaws, except it is on the first page of the advertisement.

Without compliant opt-out notice, BLP cannot maintain an affirmative defense of EBR or "prior express invitation or permission" as to any class member. 47 C.F.R. § 64.1200(a)(4)(ii) & (iv); *A Aventura*, 2013 WL 3463489, at *4 ("[T]he singular issue of the absence of the correct

opt-out language does not portend individual trials or individualized inquiries."); *C-Mart*, 299 F.R.D. at 691 (same); *Doctor Diabetic*, 2014 WL 7366255, at *5 ("Courts routinely certify TCPA class actions precisely because the requirement of an opt-out notice obviates the need to consider consent or established business relationships."); *Turza*, 728 F.3d at 684 ("Because Top of Mind omitted opt-out notices, it does not matter which recipients consented or had an established business relation with Turza.").[14]

Fourth, if the Classes prevail on liability, the Court can decide classwide whether BLP's violations were "willful or knowing" and, if so, whether to increase the automatic $500 per-violation damages. The Eleventh Circuit held in *Lary v. Trinity Physician Fin. & Ins. Servs.*, 780 F.3d 1101, 1106–07 (11th Cir. 2015), that a "willful or knowing" violation requires "the violator to know he was performing the conduct that violates the statute."

BLP claims it believed it was sending faxes to persons who had "opted in" to receive faxes in general, but not advertisements from BLP specifically. (Order, Doc. 167 at 14). Assuming that is true, it simply means BLP thought it had *implied* permission, not "express" permission. *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd 3787, 3812 ¶ 45 (Apr. 6, 2006) (express permission is "a clear statement indicating that, by providing such fax number, the individual or business agrees to receive facsimile advertisements *from that company or organization*") (emphasis added); *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 484, 497 (W.D. Mich. 2014) (permission was at best "indirect," and not *express*, where plaintiff gave fax number to American Medical Association, which then sold lists of numbers to third parties).

[14] *Sarris* did not address this issue because the faxes were sent before the 2006 effective date of the opt-out notice regulations, which were issued in the same FCC order promulgating the definition of "sender."

Moreover, this Court held at summary judgment that there is "ample evidence" BLP "decided to turn a blind eye" to its violations, "hiding behind a promise of indemnity." (Order, Doc. 167 at 15–16). Regardless whether BLP had actual knowledge it was violating the TCPA, or mistakenly believed it was legal to send faxes with implied permission, or simply did not want to know the truth, the Court can decide whether the violations were "willful or knowing" classwide. The question has nothing to do with particular class members.

TCPA Defendants sometimes argue individualized questions predominate over whether each class member remembers receiving the fax or whether it printed from the class member's fax machine. The Eleventh Circuit eliminated these arguments in *Sarris*, holding there was no requirement that the fax be "printed or seen by" the plaintiff where the transmission logs showed "that the fax information was successfully transmitted by [the fax broadcaster's] fax machine and that the transmission occupied the telephone line and fax machine of [the plaintiff] during that time," which is all that is necessary to establish a TCPA violation. *Sarris*, 781 F.3d at 1252.

In sum, the common questions of (1) whether the faxes are advertisements, (2) whether BLP is the "sender," (3) whether the opt-out notice is non-complaint, and (4) whether BLP's violations were "willful or knowing" predominate. There are *no* individualized issues. The Court should hold Rule 23(b)(3) predominance satisfied and proceed to the "superiority" prong.

B. A class action is "superior" to the alternatives.

"Superiority" addresses "the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1269 (11th Cir. 2004). Courts have consistently found a class action the superior way to resolve TCPA claims and deter unlawful fax advertising. *See Sarris*, 311 F.R.D. at 299 ("[A]ll of the faxes at issue were sent to Florida-specific zip codes and the prevalence of class-wide issues suggests that a class action would be the superior method."); *Doctor Diabetic*, 2014 WL

7366255, at *9 ("Congress expressly created the TCPA as a 'bounty' statute to increase the incentives for private plaintiffs to enforce the law."); *C-Mart*, 299 F.R.D. at 691 (noting the "large number of claims, along with the relatively small statutory damages"); *A Aventura*, 2013 WL 3463489, at *4; *Jay Clogg Realty Grp., Inc. v. Burger King Corp.*, 298 F.R.D. 304, 310 (D. Md. 2014) (class action more effective to eliminate "scourge" of unsolicited faxes); *Critchfield Physical Therapy v. Taranto Grp., Inc.*, 263 P.3d 767, 778 (Kan. 2011) (denial of certification would "frustrate the intent of the TCPA" and "protect junk fax advertisers from liability").

Rule 23(b)(3) states that relevant factors in determining superiority include (1) class members' interests in pursuing individual actions, (2) any existing individual litigation, (3) judicial efficiency, and (4) the "likely difficulties in managing a class action." Rule 23(b)(3)(A)–(D). Here, class members have little incentive to sue individually, there are no existing individual lawsuits, and judicial efficiency is best served by adjudicating all claims in one proceeding.

The fourth factor, "manageability," requires balancing "the likely difficulties in managing a class action" against the "countervailing interests" in a class action, such as the deterrent purpose of the underlying statute. *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 658 (7th Cir. 2015). The Eleventh Circuit holds manageability "will rarely, if ever, be in itself sufficient to prevent certification of a class," and "where a court has already made a finding that common issues predominate over individualized issues, we would be hard pressed to conclude that a class action is less manageable than individual actions." *Klay*, 382 F.3d at 1272–73. Manageability typically concerns three categories: "potential difficulties in notifying class members of the suit, calculation of individual damages, and distribution of damages." *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1304 (9th Cir. 1990). None of these concerns is present here.

First, there will be no unusual complications in providing class notice. Rule 23(c)(2) requires only the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Juris v. Inamed Corp.,* 685 F.3d 1294, 1321 (11th Cir. 2012) (noting "even in Rule 23(b)(3) class actions, due process does not require that class members actually receive notice" and collecting cases); *Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 757 F.3d 540, 545 (6th Cir. 2014) (affirming class and individual notice sent to target fax numbers, holding notice "need not be perfect, but simply 'the best notice that is practicable under the circumstances'").

Pursuant to Local Rule 4.04(b), Plaintiffs suggest the best and most cost-effective notice under the circumstances is a combination of fax, mail, and publication notice in substantially the form of Exhibit 13. (*See, e.g.*, *Sarris*, No. 12-cv-80178, Order on Class Notice & Opt-Out Date, Doc. 134 (Oct. 22, 2015)). Plaintiff proposes disseminating notice by (1) faxing the notice to the numbers targeted in the broadcasts, (2) for any numbers to which the notice is not successfully transmitted after three attempts, mail notice using addresses associated with the subscriber of the target telephone number,[15] and (3) given the geographically limited nature of the classes, publication notice in a major Tampa newspaper, such as the Tampa Bay Times.

Second, there will be no complications in calculating damages, since the TCPA is "relatively straightforward" in providing a fixed amount of statutory damages per violation. *C-Mart*, 299 F.R.D. at 692 (holding "the Court cannot see how it would become complicated" to calculate statutory damages in TCPA fax class action).

[15] Biggerstaff explains that subscriber names and addresses can be obtained, if necessary, "given that the numbers in this case are all in a small geographic region which is served by a single incumbent carrier (AT&T)." (Biggerstaff Supp. Report ¶ 13).

Third, there will be no complications in distributing damages. Since the TCPA provides statutory damages, Plaintiffs will seek an "aggregate award." *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1258 (11th Cir. 2003). In *Allapattah*, 333 F.3d at 1258, n.13, the Eleventh Circuit declined to allow an aggregate award in an antitrust class action where actual damages varied widely by class member. *Id.* The Eleventh Circuit distinguished *Six Mexican Workers*, 904 F.2d at 1306–07, where the Ninth Circuit affirmed an aggregate statutory-damages award for a class of undocumented workers, the majority of whom could not be located, holding that "where the statutory objectives include enforcement, deterrence or disgorgement," a class action "may be the 'superior' and only viable method to achieve those objectives, even despite the prospect of unclaimed funds," with a cy pres "distribution of unclaimed funds to indirectly benefit the entire class." *Id.* The Eleventh Circuit also distinguished *Van Gemert v. Boeing Co.*, 553 F.2d 812, 813 (2d Cir. 1977), *aff'd* 444 U.S. 472 (1980), where "the precise aggregate damages of the class could be ascertained easily by a simple mathematical calculation." *Id.*

As in *Six Mexican Workers*, this case involves statutory damages with a deterrent purpose, and as in *Van Gemert*, the aggregate award can be determined through "simple mathematical calculation" by multiplying the number of violations found by the jury by $500 (or whatever increased amount the Court awards if it finds the violations willful or knowing). Whatever money remains in the fund after deducting attorney fees and expenses and paying class claims can be distributed via cy pres. *Six Mexican Workers*, 904 F.2d at 1303–04; *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013) ("In a class action the reason for a remedy modeled on cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds," especially in cases involving statutory damages, which have an inherent "deterrent objective.").

BLP may complain that its potential liability is substantial, with 343,122 faxes translating to $171,561,000 at $500 per fax.[16] But the magnitude of the exposure does not affect superiority. *See Klay*, 382 F.3d at 1274 ("It would be unjust to allow corporations to engage in rampant and systematic wrongdoing, and then allow them to avoid a class action because the consequences of being held accountable for their misdeeds would be financially ruinous."). In *Doctor Diabetic*, 2014 WL 7366255, at *9–10, the court held a class was superior under *Klay*, rejecting the "ruinous liability" argument because the TCPA "reflects Congress's judgment that defendants should face $500 in liability for each fax advertisement that fails to include an opt-out notice." *See also Manno v. Healthcare Rev. Recovery Grp., LLC*, 289 F.R.D. 674, 681–82 (S.D. Fla. 2013) (TCPA class superior under *Klay*, and "larger" liability does not mean "disproportionate," where Congress has determined the "proportionate and appropriate" damages)

BLP is worth approximately $1.5 billion, with annual revenue of $313 million and $55.2 million in operating income. Forbes.com, *The Business of Football*, http://www.forbes.com/teams/tampa-bay-buccaneers/ (last visited Mar. 24, 2016). BLP generated substantial revenue from the fax advertisements giving rise to this action (*see, e.g.*, BLP00676), and it should not be permitted to avoid the consequences.

Conclusion

For the foregoing reasons, the Court should certify Classes A, B, and C, appoint Plaintiffs as class representatives, appoint A+W class counsel and Michael Addison co-class counsel, approve class notice substantially in the form of Exhibit 13, and set the case for trial.

[16] Damages are actually per "violation" of the regulations, not per fax. *Lary*, 780 F.3d at 1106.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 25, 2016, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the persons listed below:

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CIN-Q AUTOMOBILES, INC. and MEDICAL & CHIROPRACTIC CLINIC, INC., individually and as representatives of a class of similarly-situated persons,	)	
Plaintiffs,	)	Civil Action No.: 8:13-CV-01592-AEP
v.	)	
BUCCANEERS LIMITED PARTNERSHIP and JOHN DOES 1-10,	)	
Defendants.	)	

PLAINTIFFS' APPENDIX OF EXHIBITS TO MOTION FOR CLASS CERTIFICATION

1. Deposition of Matthew Kaiser (w/o exhibits)
2. BLP Resp. First. Req. Admissions
3. Compilation of BLP Documents Produced in Discovery
4. Expert Report of Robert Biggerstaff
5. Declaration of Robert Biggerstaff
6. Supplemental Report of Robert Biggerstaff
7. Declaration of Ian Jenkins
8. Deposition of Ian Jenkins (w/o exhibits)
9. Deposition of Craig Cinque (w/o exhibits)
10. Deposition of Michelle Zakrzewski (w/o exhibits)
11. Firm Resume of Anderson + Wanca
12. Brief Biography of Michael C. Addison
13. Proposed Class Notice